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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES E. EVANS, Defendant and Appellant.	A134606 (Alameda County Super. Ct. No. C165969)

James E. Evans appeals from a judgment upon his plea of no contest to nine counts of robbery (Pen. Code,[1] § 211), and his admission that he personally used a firearm (§ 12022.5, subd. (a). He contends that the trial court abused its discretion in denying his requests to withdraw his plea and to discharge his retained counsel. We affirm.

FACTUAL BACKROUND

On May 10, 2011, an information was filed charging defendant with nine counts of robbery, two counts of receiving stolen property (§ 496, subd. (a)), five counts of being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1)), one enhancement for inflicting great bodily injury (§ 12022.7, subd. (a)), and two enhancements for use of a knife and a firearm (§§ 12022, subd. (b)(1); 12022.5, subd. (a)(1)). The information further alleged that defendant suffered six prior serious felony convictions (§§ 667,

[1] All further statutory references are to the Penal Code.

subd. (a); 1192.7, subd. (c)). The charges were based on a string of robberies against women committed from June to September 2009 in Berkeley and Oakland.

On August 15, 2011, defendant pled no contest to nine counts of robbery and admitted an enhancement for use of a firearm. Prior to taking the plea, the court, in response to an inquiry from defendant, explained that he would not be able to withdraw his plea if he changed his mind.

The sentencing hearing was held on November 8, 2011. Defendant sought to withdraw his plea. The court ruled that there was no basis for defendant to withdraw his plea, and sentenced defendant to 17 years in state prison.

DISCUSSION

Defendant contends that the trial court abused its discretion when it refused to permit him to withdraw his plea. He contends that the trial court improperly coerced and threatened him into entering a plea.

A court may, upon a showing of good cause, permit a defendant to withdraw a guilty plea at any time before judgment. (§ 1018.) "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) "Other factors overcoming defendant's free judgment include inadvertence, fraud or duress . . . . [Citation.] 'The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty.' " (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146 (*Weaver*); quoting *People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

Relying on *Weaver, supra,* defendant contends that the trial court coerced and unduly influenced him into entering a plea. We are not persuaded.

In *Weaver*, a child molestation case, the trial court strongly encouraged the parties to enter into a plea agreement. (*Weaver, supra,* 118 Cal.App.4th at pp. 134, 136.) The court made numerous remarks that "it appeared appellant was a pedophile" and that a sentence "short of 15 years to life would be fair." (*Id.* at p. 135.) The court told the defendant that " '[a]s soon as the first little girl in the pink dress sits down you know,

then you're going to see the real victim. You'll see the real impact.' The court stated it would not be pretty.' " (*Id.* at pp. 135–136.) The court told the defendant that he was taking a big risk, and that it did not want to see the girls " 'victimized' again." (*Id.* at p. 136.) On more than one occasion, the court called the case "ugly," and noted the strength of the prosecutions' case: " 'You're not going to resolve [the case], and that's fine. So we're going to get the monster by the tail, bring it into the courtroom and put him on that table and let him puke all over the place and crap all over the place. It's going to be ugly. This is going to be ugly." (*Id.* at p. 138.) The court opined that in view of the evidence, defendant was going to be convicted and that he faced a long prison sentence. (*Id.* at pp. 135–136, 138.) When the defendant finally entered a guilty plea, the trial court remarked that the evidence was overwhelming and he was "pleased that the guilty plea would make it unnecessary that the victims testify." (*Id.* at p. 140.) Defendant pled guilty to four counts of lewd acts upon a child. (*Id.* at p. 133.) On appeal, the court held that the trial court's conduct was inappropriate and that the defendant had established good cause for withdrawal of his plea. (*Id.* at p. 149.) The court concluded that while judges can have a useful role in plea negotiations, "when the trial court abandons its judicial role and thrusts itself to the center of the negotiation process and makes repeated comments that suggest a less-than-neutral attitude about the case or the defendant, then great pressure exists for the defendant to accede to the court's wishes." (*Id.* at p. 150.)

Weaver is distinguishable from the present case. Here, on the date set for trial, the prosecutor informed the court that the parties were "pretty far apart" on plea negotiations, with the People offering in the 20-year range and defendant wanting 10 years. The prosecutor further explained that defendant's exposure was 39-plus years. The court put the matter over to the afternoon calendar to give the parties time to chat, noting that defendant faced "[v]ery serious charges," and potentially a 40-year sentence at 85 percent time. The court remarked, "I am just asking Mr. Evans, because sometimes you find yourself in a place that you wish you weren't, but this is where you are. And these are the priors that are alleg[ed], and this is what's alleged for right now against you. And all

I know, sir, is all I do is trials. I don't sit in this department. You have got one person coming in saying you did it, two people coming in saying you did it, a third person comes in and says you did it, the fourth person comes in and says he did it, the fifth person says he did it. And they point at you. The sixth person says he did it. The seventh person says he did it, the eighth person, he did it, the [ninth] person says he did it, and then the tenth person says he did it. [¶] I am just saying I want you to talk to your lawyer and realistically, look at what your options are to potentially control your life. That's all I am saying. You get an open mind, think about it for the next few hours and counsel, if you talk more, great." That afternoon, the parties informed the court that they had negotiated an agreement under which defendant would plead guilty or no contest to nine counts of robbery and admit an enhancement; the remaining charges would be dismissed and defendant would be sentenced to a term of 17 years.

Here, unlike in *Weaver*, the court's remarks did not go "too far." (*Weaver, supra,* 118 Cal.App.4th at p. 149.) "There is no rule in California forbidding judicial involvement in plea negotiations. Nonetheless courts have expressed strong reservation about the practice." (*Id.* at p. 148.) The court's role here was slight; it simply informed defendant that he would be facing 10 victims who would identify him as the robber, and suggested that he discuss all of his options with his defense counsel. It made no further comment on the record, and fully admonished defendant about the plea and its consequences prior to accepting it. Defendant has not established good cause for withdrawing the plea.

People v. Williams (1969) 269 Cal.App.2d 879, also cited by defendant, is inapposite. In *Williams* the court, during plea negotiations, gave the defendant erroneous advice concerning the implications of an entrapment defense, warned him that if he did not plead, the prosecutor would charge him with a prior offense resulting in a mandatory prison sentence, and assured him incorrectly that if he pled guilty, the court retained the power to grant probation and not send him to state prison. (*Id.* at pp. 881–884.) The court of appeal held that the defendant should have been given an opportunity to withdraw his plea given the court's erroneous representations. (*Id.* at p. 885.) Here, in

contrast, the court did not give defendant any erroneous advisements. It fully and correctly informed defendant of the consequences of his plea.

The record also reflects that the court specifically advised defendant he could not change his mind after entering his plea. After being advised of the consequences of his plea and answering affirmatively that he understood each of his rights, defendant asked, "[c]an I withdraw my plea if I change my mind? The hearing continues as follows: "[MR. KELVIN (defense counsel)]: No. [¶] [THE COURT]: If it's a knowing, voluntary, intelligent and free waiver, that is the plea. [¶] [THE DEFENDANT]: So I can't take it back at the time? [¶] [THE COURT]: Sir, the law provides that if you make a knowing, intelligent, free and voluntary waiver with the full understanding of the nature of the consequences, there will be no basis to allow you to withdraw your plea . . . ." Defendant thereafter acknowledged that he understood that a no contest plea was the same as a guilty plea, that he was not being forced or threatened into entering the plea, that he was doing so freely and voluntarily, and that no one had made him any promises except what had been said in court. On this record, defendant has not met his burden of showing good cause for withdrawal of a plea.

Defendant next contends that the court erred in denying his request to discharge his retained attorney and obtain a court-appointed lawyer. This contention lacks merit.

"[T]he right to counsel of choice reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain. [¶] A nonindigent defendant's right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations.]" (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) A *Marsden*[2] motion is not the appropriate vehicle to consider a complaint against retained counsel. (*People v. Lara* (2001) 86 Cal.App.4th 139, 155.)

[2] *People v. Marsden* (1970) 2 Cal.3d 118.

The record shows that defendant first raised the issue of his retained counsel in a letter to the court. On November 1, 2011, the date set for sentencing, the court acknowledged that it had read a letter from defendant in which he asked the court if he could file a *Marsden* motion and raised questions concerning the evidence against him. The court informed defendant that since he had retained counsel, he had the right to fire his lawyer, and retain a new one. And, if he could not afford an attorney, and wanted to be referred to the Public Defender's office to determine if he were eligible for an appointed attorney, the court could do that. Defendant said that he wanted to talk with his attorney before making any decisions.[3] The court commented, "I read your letter. A lot of people have buyer's remorse after they change their plea. This isn't completely unusual. That doesn't mean you get to withdraw your plea . . . ." The court continued the matter to November 8, 2011, when defendant's attorney would be available, and told defendant that "[i]n the meantime, because you were able to afford an attorney, you may want to start looking into getting another attorney, if that's what you want to do. Again, I don't get involved with your relationship with a privately retained attorney."

The sentencing hearing was held on November 8, 2011. The court told defendant that it was too late for him to raise questions about the evidence because he had already pled. The following colloquy ensued: "[THE DEFENDANT]: "That's the problem. See that's what I'm discussing with Mr. Kelvin. The whole time I've been trying to get myself together I haven't had an attorney to come talk to me and work things out and explain my situation. [¶] [THE COURT]: Why did you plead guilty or no contest? [¶] [THE DEFENDANT]: I was like forced into it. [¶] [THE COURT]: Were you asked at the time you changed your plea whether anyone forced you or threatened you in order to get you to change your plea? [¶] [THE DEFENDANT]: Mr. Kelvin told me he wasn't able to bring up any evidence for me to help me out so to go ahead and plead no contest." The court then reviewed the change of plea transcript and noted that Judge Rhynes had not taken the plea hastily. Defendant then interjected, "I was asking the Court to get a

[3] Mr. Kelvin was not present at the hearing; another attorney appeared on his behalf.

court-appointed attorney to discuss my situation with." The court responded, "I guess the situation you want to discuss is withdrawing your plea, and I don't see grounds to withdraw your plea." The court again reviewed the change of plea transcript, and remarked that Judge Rhynes had told defendant that he could not withdraw his plea if he made a " 'knowing, intelligent, free and voluntary waiver.' " The court also reviewed with defendant that part of the transcript in which Judge Rhynes had admonished defendant that she could not take the plea if anyone was forcing him or threatening him to enter the plea.

"[A] defendant's right to discharge his retained counsel is not absolute, and the trial court retains discretion to deny such a motion if the discharge" would result in significant prejudice to the defendant or if the motion is untimely and would disrupt the orderly processes of justice. (*People v. Lara, supra,* 86 Cal.App.4th at p. 155.) Here, the record is far from clear that defendant wished to discharge Mr. Kelvin. A week prior to the sentencing hearing, the court advised defendant of his options of either retaining a new attorney or requesting a referral to the Public Defender's office. Defendant did neither, and appeared at the sentencing hearing with Mr. Kelvin. Even if we construe defendant's statement, that "he was asking the Court to get a court-appointed attorney . . ." as a request to discharge Mr. Kelvin, the trial court did not err in implicitly denying the request. " ' "The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel." ' " (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 429.) Defendant's request, made on the day of sentencing, was untimely. (*Ibid.* [court is within its discretion to deny last-minute request for new counsel].)

DISPOSITION

The judgment is affirmed.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Humes, J.